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DISCUSSION RESPONSE

The Proportionality Critique Still Stands

SUÉ GONZÁLEZ HAUCK — 12 August, 2015 Print 0

A Rejoinder to Johann Ruben Leiss

Sué González Hauck

Johann Ruben Leiss critically remarks that the perception underlying my original post "overburdens proportionality balancing with assumptions and expectations that do not reflect its character". This rejoinder aims at resolving some apparent misunderstandings about both the object and the thrust of my critique. My aim is to once again highlight the dangers inherent in the overuse of the prevalent concept of proportionality balancing in the singular pursuit of "harmonization".

These dangers mainly consist in the deformalization of legal discourse, in intransparency, in the perpetuation of structural bias, and in shifts in the burden of justification. All of these dangers are connected to two common misrepresentations that can be found in a large amount of scholarly writings on the subject and also in Johann Ruben Leiss' reply to my original post. These misrepresentations consist, first, in misleadingly declaring proportionality balancing to be a "neutral framework" and, second, in neglecting important differences between rights adjudication in domestic constitutional law and adjudication within specialized regimes of international law, as well as differences between domestic legal orders and international law in general. Instead of restating and defending my original argument in more detail, this rejoinder focuses on these misrepresentations.

Proportionality balancing is not a neutral framework

Questioning the neutrality of proportionality balancing as an argumentative framework is not equivalent to stating that proportionality balancing would substantively dictate the result of a legal decision. The latter is obviously not the case. However, there are two main reasons why proportionality balancing is not applied as a neutral framework.

First, the basic structure of proportionality balancing does not treat the two conflicting principles that are being weighed against each other equally. Given that proportionality balancing was originally developed in the context of rights adjudication, one of the principles is treated as being of value *a priori*, while the second principle serves only as a justification for deviations from the first principle. Thus, proportionality balancing as an

argumentative framework is biased towards the first principle. This is not necessarily problematic in the context for which proportionality balancing was developed originally, namely rights adjudication. In the domestic constitutional context, a given right can serve as the starting point of proportionality balancing in one case and as a justification for the encroachment on another right in another case. Thus, overall, the patterns that emerge from applying proportionality balancing in rights adjudication do not necessarily lead to an imbalance towards a specific right or set of rights. When proportionality balancing is employed as a tool for the harmonization of different sub-systems of international law, however, the starting point is always a rule belonging to the specific sub-system for which the respective adjudicatory body has jurisdiction. The structure of proportionality balancing thus favours the perpetuation of the structural bias inherent in the specific sub-system.

Second, proportionality balancing as harmonization tool is not the same as proportionality balancing as an instrument of rights adjudication. Proportionality balancing as it has been developed by domestic constitutional courts has evolved into an argumentative framework with a quite sophisticated structure. The argumentative patterns that have been formed enable constitutional courts to produce predictable and transparent decisions, even though these decisions are based on relatively open-structured norms. As harmonization tool, however, proportionality balancing tends to lack both of these qualities. It is not employed in the nuanced way in which constitutional courts apply it, but rather reduced to one of its three steps, either necessity or proportionality *stricto sensu*.

Although it is not employed in an equivalently nuanced way, proportionality balancing as harmonization tool profits from the legitimacy that it has gained in constitutional rights adjudication. Given that proportionality balancing is an attractive tool for adjudicators and given that it can only be employed in cases where principles, not rules, are in conflict, it encourages international courts and tribunals to identify principles that supposedly can be found *behind* the rules. In an attempt to broaden the scope of proportionality balancing, legal scholarship has already resorted to reconstruct the goals of entire sub-systems of international law as principles. Thomas Kleinlein cites free trade, the protection of foreign investors and development, the protection of basic human rights, the humanization of armed conflict, self-determination, putting an end to impunity for the perpetrators of international crimes, and protection of the environment as examples for goals that have been reformulated as principles. If proportionality balancing is employed in such a manner, it achieves the opposite of what it achieves in constitutional rights adjudication.

The process of reformulating entire systems of rules is what I identified as deformalization of legal discourse. It neglects the function of rules as the result of a political process. Legal reasoning should reflect this process. It should try to reconstruct it and supplement it by a legal decision in the case at hand. This legal decision is nothing more than a political decision to which specific (legal) standards of justification apply. When entire sub-systems of rules are replaced by principles that are little more than rules of thumb, legal and political reasoning is replaced by what Koskenniemi calls managerialism. Expert knowledge takes the place of political decisions. A technical language describing the search for optimal results replaces a political

and legal language describing choices between different preferences.

Fragmentation and the specificities of international law

One characteristic of the international legal system is particularly important when it comes to assessing the potential of proportionality balancing as harmonization tool: The different specialized sub-systems of international law are not equipped with equally powerful judicial and quasi-judicial organs. On the universal level, this is particularly true regarding international economic law on the one hand and international human rights law on the other hand. Thus, the shift in the burden of justification, which occurs when human rights are introduced into international economic law using Art. 31(3)(c) VCLT and proportionality balancing, has implications beyond the sub-system of international economic law.

It is not only the institutional imbalance, however, that should make international legal scholars and practitioners more cautious in their assessment of the potential of proportionality balancing as harmonization tool. A vast amount of literature spurred by the fragmentation debate tends to pursue coherence of the international legal system as an end in itself. Not only does this approach neglect the possible benefits of the diversification of international. It also risks aggravating the problems that are generally ascribed to fragmentation. The fact that international law is becoming increasingly differentiated and diverse holds the potential for reflecting plurality and enabling contestation. A conflict of legal norms usually reflects an underlying political conflict. By openly addressing normative conflicts in international law, one can thus address a political conflict

with legal means. This, however, is only the case if the conflict is not glossed over in an attempt at harmonization.

International legal scholars and practitioners who have voiced concerns about the fragmentation of international law have done so because they fear that it might endanger equality before the law, that it might lead to a lack of legal certainty and that it might contribute to the prevalence of technocracy to the detriment of legal reasoning. Any attempt at the harmonization of international legal norms should therefore aim at mitigating these problems. This aim cannot be achieved by simply transplanting argumentative frameworks from the domestic to the international context. Proportionality balancing works well for domestic constitutional courts, because they usually find themselves at the top of an institutional hierarchy and because their role as constitutional courts consists in taking into account the entire legal order and in holding it to the standard of the constitution. Constitutional courts are also embedded in a system of political and social institutions that, first, produce the minimal consensus that it necessary for them to perform their functions as constitutional courts and, second, have the ability to correct the courts' decisions if this is deemed necessary. In contrast, adjudicatory bodies on the international level, especially those that only have jurisdiction over one special sub-set of international legal norms, lack the mandate and the social and political context to carry out the same functions.

Concluding Remarks

Johann Ruben Leiss' reply is marked by the same kind of thinking that I have criticised in some of the existing writings on proportionality balancing as a tool for the

harmonization of international law. It wrongly equates proportionality balancing as applied by constitutional courts in the domestic context to proportionality balancing as harmonization tool. It disregards the pluralistic and decentralized structure of the international legal order. The conclusion to be drawn from my critique is not that legal scholars and practitioners should not look beyond the specific sub-set of international legal norms that they are dealing with. Instead, normative conflicts have to be addressed in a transparent manner, which enables political contestation instead of impeding it. Proportionality balancing alone is not an appropriate framework for achieving this, especially not if it is presented at a neutral device that serves to achieve optimal results in an objective manner.

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